No. 05-1272

IN THE

Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP., *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR TAXPAYERS AGAINST FRAUD EDUCATION FUND AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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November 20, 2006

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INTEREST OF *AMICI CURIAE*[1]

Taxpayers Against Fraud Education Fund ("TAF") is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act, has participated in litigation as a *qui tam* relator and as an *amicus curiae*, and has provided testimony to Congress about ways to improve the Act. TAF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation and implementation of the Act.

The National Employment Lawyers Association ("NELA") is the only professional membership organization in the country composed of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a membership of more than 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

STATEMENT

Congress enacted the False Claims Act ("FCA") in 1863 at President Lincoln's request to combat rampant fraud in procurement during the Civil War.[2] It has since been

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amici* represents that counsel for all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

[2] *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 ("1863 Act"), *reenacted by* Rev. Stat. §§ 3490-3494, 5438 (1878); *see also United States ex rel.*

twice amended, once in 1943 and again in 1986. The historical background to the 1943 and 1986 amendments to the FCA is important to place the statutory construction issue in this case in its proper context.

A. The 1863 Statute Permitted Parasitic Claims Based Only On Public Information

As originally enacted, the FCA allowed any person to bring suit alleging that another had defrauded the Government. *See* 1863 Act § 4, 12 Stat. 698 ("[s]uch suit may be brought and carried on by any person, as well for himself as for the United States"). Although the relator had to bear all costs of the litigation, *see id.*, success reaped the relator one-half of the total proceeds recovered and collected, *see id.* § 6, 12 Stat. 698. *See also United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

Federal courts entertained few *qui tam* suits after the enactment of the FCA, but saw a marked increase in the 1930s and 1940s with the rise of government contracts stemming from the New Deal and World War II. *See United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1041 (8th Cir. 2002); *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320, 324 (1st Cir. 1994); *Springfield*, 14 F.3d at 649. The 1863 Act "permitted a private relator to initiate suit even though that private individual contributed nothing to the exposure of the fraud alleged." *Williams*, 931 F.2d at 1497; *see S. Prawer & Co.*, 24 F.3d at 324; *Springfield*, 14 F.3d at 649. Relators took advantage of that statutory permissiveness, often bringing "parasitical" claims in which "the relator sued upon information copied from government files and indictments."

Williams v. NEC Corp., 931 F.2d 1493, 1496-97 (11th Cir. 1991) (recounting FCA history); *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1354 (D. Mass. 1988) (same); H.R. Rep. No. 99-660, at 17 (1986); S. Rep. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

Williams, 931 F.2d at 1497; *see Minnesota Ass'n*, 276 F.3d at 1041; *LaValley*, 707 F. Supp. at 1354.

This Court took up the Government's challenge to such "parasitic" claims in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The Government claimed that Marcus "received his information not by his own investigation, but from [a] previous indictment." *Id.* at 545. Interpreting the statute consistent with its plain meaning, the Court rejected the Government's contentions that a relator should have to sue based on his own information and that the statute's plain meaning inappropriately encouraged "unseemly races for the opportunity of profiting from the government's investigations." *Id.* at 546-47. Nothing in the FCA as enacted in 1863 prevented such parasitic suits, this Court concluded.

B. The 1943 Amendment Imposed A "Government Information Bar" That Precluded Valid Suits By Relators Who Provided Original Information To The Government

"*Hess* inspired public outcry over the liberality of the *qui tam* provisions that prompted speedy congressional response." *Springfield*, 14 F.3d at 650; *see S. Prawer & Co.*, 24 F.3d at 325. In direct response to *Hess*, Congress amended the FCA in 1943 to eliminate "parasitical" suits. *See Minnesota Ass'n*, 276 F.3d at 1041; *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 671 (9th Cir. 1978) (citing *United States v. Rippetoe*, 178 F.2d 735, 736 (4th Cir. 1949); *United States v. Pittman*, 151 F.2d 851, 853-54 (5th Cir. 1945)). "[T]he House bill would have repealed the *qui tam* provisions altogether, while the Senate bill barred *qui tam* jurisdiction for suits based on information already in possession of the government unless the information was 'original with such person.'" *Springfield*, 14 F.3d at 650 (citing 89 Cong. Rec. 10,744 (1943)).

In the conference to resolve differences between the House and Senate versions, the Senate's "original source" provision was dropped without explanation and replaced

with the "government information bar." *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d Cir. 1991); *Pettis*, 557 F.2d at 671; *LaValley*, 707 F. Supp. at 1354-55. As a result, the 1943 statute contained a broad jurisdictional bar against *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609 ("1943 Act"); *see LaValley*, 707 F. Supp. at 1354-55 & n.3. In the decades that followed, "courts strictly construed the jurisdictional bar established in the 1943 amendments." *S. Prawer & Co.*, 24 F.3d at 325.

That strict construction reached its "nadir" when the Seventh Circuit decided *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). *See S. Prawer & Co.*, 24 F.3d at 325; *Springfield*, 14 F.3d at 650. In *Dean*, the court of appeals considered whether the State of Wisconsin could maintain its *qui tam* suit based on information it was required to submit to the Federal Government regarding Alice Dean, a medical doctor convicted "in state court of making fraudulent claims for Medicaid reimbursements." 729 F.2d at 1102. It was undisputed that (1) the State had conducted the fraud investigation; (2) the State was an original source of the information; and (3) the Federal Government required the State to report the fraud" to the Federal Government. *See id.* at 1102-03. Nevertheless, because the government-information bar precluded *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States," 1943 Act § 1, 57 Stat. 609, the Seventh Circuit in *Dean* concluded that Wisconsin's *qui tam* suit was barred. *See* 729 F.2d at 1106-07; *see also Minnesota Ass'n*, 276 F.3d at 1041; *S. Prawer & Co.*, 24 F.3d at 325-26.

The Seventh Circuit concluded that, if Wisconsin wanted an exemption to the FCA due to its requirement that the State report Medicaid fraud to the Federal

Government, "then it should ask Congress to provide the exemption." *Dean*, 729 F.2d at 1106; *see Springfield*, 14 F.3d at 650. The National Association of Attorneys General did just that in the wake of *Dean*, adopting a resolution calling on Congress to rectify "the unfortunate result" of the *Dean* decision. S. Rep. No. 99-345, at 13, 1986 U.S.C.C.A.N. 5278.

C. The 1986 Amendment Allows Suits Based On A Public Disclosure, As Long As The Relator Is An "Original Source"

Against that background, Congress amended the FCA in 1986 "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99-345, at 1, 1986 U.S.C.C.A.N. 5266; *see S. Prawer & Co.*, 24 F.3d at 326. The 1986 amendment sought to achieve a middle ground between the over-permissiveness of the 1863 Act, which allowed "parasitic" claims based purely on the public disclosures, and the over-restrictiveness of the 1943 amendment, which denied recovery to relators even when they independently discovered, investigated, and reported fraud to the Government. *See Minnesota Ass'n*, 276 F.3d at 1040-41 ("The 1986 amendments were an avowed attempt to reinvigorate the [FCA] after [the] 1943 amendment and judicial decisions interpreting the 1943 amendment had emasculated the 1863 law.").

Congress's solution was the "public disclosure bar." Rather than preclude suits based on information in the Government's possession, Congress erected a jurisdictional bar against suits based on a "public disclosure of allegations or transactions." 31 U.S.C. § 3730(e)(4)(A). As amended in 1986, the FCA provides that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media." *Id.* Congress further enacted two

exceptions to that jurisdictional bar. A court may exercise jurisdiction over a suit "based upon the public disclosure of allegations" when "the action is brought by the Attorney General or the person bringing the action is an original source of the information." *Id.*

An "original source" is defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* § 3730(e)(4)(B). This case concerns the meaning of the "original source" exception to the "public disclosure bar."

SUMMARY OF ARGUMENT

The "public disclosure bar" of the False Claims Act ("FCA") precludes jurisdiction over certain *qui tam* actions that are based on the public disclosure of fraud allegations or fraudulent transactions. *See* 31 U.S.C. § 3730(e)(4)(A). A court has jurisdiction over such a suit only if it is brought by the Attorney General or an "original source" relator. Jurisdiction exists over the present suit because the relator, Stone, is an original source of the information on which the allegations in his *qui tam* complaint were based.

An "original source" is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* § 3730(e)(4)(B). By that plain language, the relator must voluntarily provide the Government with information about the allegations that form the basis of the complaint prior to filing an FCA *qui tam* action, and the relator must have obtained knowledge of this information through his own efforts and not through the public disclosure. Information is "voluntarily provided" when given to the Government without compulsory process.

That interpretation of "original source" follows from the plain meaning of § 3730(e)(4)(B), which speaks in unambiguous terms. It is "entirely in accord with the Act's legislative history," *Zedner v. United States*, 126 S. Ct. 1976, 1985 (2006), and it is consistent with the statutory history of the FCA, which has twice been amended since its enactment in 1863, both times in response to judicial decisions deemed to be inconsistent with Congress's policy objectives. The "original source" exception seeks to prevent parasitic suits by opportunistic late-comers based purely upon public disclosures of information while preserving actions brought by relators who provide original information about false claims to the Government. Reading § 3730(e)(4)(B) any more restrictively will deter genuine relators from coming forward, perpetuating a range of undiscovered frauds.

The Tenth Circuit's decision below is entirely consistent with that understanding of the "original source" exception. The relator, Stone, "learned from studying Rockwell's plans for manufacturing pondcrete that the blocks would leak toxic waste," and he made his concerns known to Rockwell, which told him to keep quiet. Pet. App. 21a. He used that information as the basis for the allegations of fraud in his complaint. As a result, Stone had direct and independent knowledge of information underlying the fraud allegations in his complaint. Moreover, he voluntarily provided that information to the Government prior to filing suit. He did not derive his information from the public disclosure. Because that is all the statute requires, the judgment below should be affirmed.

ARGUMENT

I. JURISDICTION PURSUANT TO 31 U.S.C. § 3730(e)(4)(A) DEPENDS ON "THE STATE OF THINGS" WHEN THE ACTION IS BROUGHT

A. The General Rule That Jurisdiction Is Determined When Suit Is Filed Applies To § 3730(e)(4)(A) Original Source Determinations

When "the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1245 (2006) (footnote omitted). Section 3730(e)(4)(A) limits the "jurisdiction" of courts entertaining suits under the FCA. As relevant here, a court has jurisdiction over a suit "based upon the public disclosure of allegations or transactions" when "the person bringing the action *is* an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (emphasis added). The statute thereby "confer[s] subject-matter jurisdiction only for actions brought by specific plaintiffs." *Arbaugh*, 126 S. Ct. at 1245 n.11.

Because § 3730(e)(4)(A) "is expressed in the present tense," the "plain text of this provision . . . requires that [jurisdictional] status be determined at the time suit is filed." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). In *Dole*, the defendant claimed to be an "instrumentality" of the State of Israel within the meaning of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), and therefore entitled to remove suits against it pursuant to 28 U.S.C. § 1441(d). This Court concluded that "the plain text of [§ 1603(b)(2)], because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." 538 U.S. at 478. Likewise, because § 3730(e)(4)(A) is "expressed in the present tense," Stone's status as an "original source" must "be determined at the time suit is filed." *Id.*

Focusing the jurisdictional inquiry on a relator's status at the time he files suit is consistent with the history of the FCA. The current version of the Act resulted from a 1986 amendment to the 1943 Act, which precluded jurisdiction when "it shall be made to appear" that the "suit was based upon evidence or information" in the Government's possession "*at the time such suit was brought.*" § 1, 57 Stat. 609 (emphasis added). Although that language does not appear in the 1986 amendment, this Court does not "presume that the revision worked a change in the underlying substantive law 'unless an intent to make such a change is clearly expressed.'" *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957)) (alterations omitted). Given that Congress employed the present tense and gave no indication that it was changing the relevant "time" for making the jurisdictional determination when it amended the FCA in 1986, the "time-of-filing" rule from the 1943 Act therefore is the most logical way to construe § 3730(e)(4)(A). *Id.* at 208.

Determining a relator's status at the time he files suit also is consistent with the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Id.* at 207 (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.)); *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (same); *Dole*, 538 U.S. at 478. Thus, in a *qui tam* suit, whether "the person bringing the action is an original source" depends only on "the state of things at the time of the action brought," not the state of things at trial or post-verdict.

B. Petitioners' Contention That Jurisdictional Requirements For Original Source Status Must Be Maintained Throughout The Litigation Has No Merit

Petitioners argue that, because § 3730(e)(4)(A) is jurisdictional, "the requirements of the original source exception must be satisfied at all stages of the litigation." Pet.

Br. 28-29. But that assertion is inconsistent with the plain meaning and history of § 3730(e)(4)(A) and the centuries-old principle that jurisdiction is based on "the state of things at the time of the action brought." *Mollan*, 22 U.S. (9 Wheat.) at 539. Moreover, this Court has "consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam). The Court has applied that principle in a variety of contexts, holding, for example, that a change in a party's citizenship while a suit is pending does not divest a court of diversity jurisdiction. *See, e.g., id.*; *Wichita R.R. & Light Co. v. Public Util. Comm'n of Kansas*, 260 U.S. 48, 54 (1922). There is no reason to view use of the term "jurisdiction" in § 3730(e)(4)(A) any differently. Such "jurisdiction," if established at the initiation of the suit, cannot be divested by events during discovery, at trial, or post-verdict, as petitioners erroneously contend (Pet. Br. 27-30). *Compare FDIC v. Four Star Holding Co.*, 178 F.3d 97, 101 (2d Cir. 1999) ("hold[ing] that the transfer of assets by FDIC to a private third party does not divest the court of subject matter jurisdiction under [12 U.S.C. §] 1819," even though jurisdiction under § 1819 requires the FDIC to be a party).

II. JURISDICTION EXISTS WITHIN THE PLAIN MEANING OF 31 U.S.C. § 3730(e)(4) BECAUSE THIS SUIT WAS BROUGHT BY AN "ORIGINAL SOURCE"

A. Not Every Relator Is Required To Be An "Original Source"

Not every *qui tam* suit presents the question whether the relator is an "original source." That question arises only when a relator's suit under the FCA is "based upon the public disclosure of allegations or transactions." 31 U.S.C. § 3730(e)(4)(A). A court must therefore evaluate two predicate questions before the "original source" issue even arises. *See, e.g., United States v. Emergency Med. Assocs. of Illinois, Inc.*, 436 F.3d 726, 728 (7th Cir. 2006);

Walburn v. Lockheed Martin Corp., 431 F.3d 966, 974 (6th Cir. 2005); *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 915-16 (D.C. Cir. 1999).

The first is whether there has been a "public disclosure of allegations or transactions." If no public disclosure has occurred, then § 3730(e)(4)(A) presents no impediment to the court's jurisdiction. If there *has* been a "public disclosure," then a court must determine whether the *qui tam* action is "based upon" that public disclosure. Only if the relator's action is "based upon" the public disclosure must he be an "original source."

This case comes to the Court having had both predicate questions answered affirmatively. The parties agree that Stone's suit is "based upon" a "public disclosure." The question for this Court therefore is whether Stone is an "original source" within the meaning of § 3730(e)(4)(B).

B. To Be An Original Source, A Relator Must Have Direct And Independent Knowledge Of Information That Supports The Essential Allegations In His Complaint, And Provide That Information To The Government Prior To Filing Suit Without Being Compelled To Do So

The core of the "original source" exception to the public-disclosure bar is the relator's information about the defendant's false claims to the Government. At the time the relator files suit, the relator's allegations must be "based on" that information; the relator must have "direct and independent knowledge" of that information; and the relator must already have "voluntarily provided" that information to the Government. 31 U.S.C. § 3730(e)(4)(B). Determining when a relator is an "original source" turns on the plain meaning of each of those statutory requirements. *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *see also Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) ("[W]ords in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'") (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)).

1. The "information on which the allegations are based" is information that can be used to prove allegations entitling the relator to relief

a. Because jurisdiction pursuant to § 3730(e)(4)(A) must be determined at the time the suit was brought, *see supra* Part I, the relevant "allegations" for purposes of § 3730(e)(4)(B) are those in the relator's complaint.[3] An "allegation," in turn, is a "formal statement of a factual matter as being true or provable, *without its having yet been proved*." *Black's Law Dictionary* 81 (8th ed. 2004) (emphasis added).[4]

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[3] *See United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999) ("To establish original source status knowledge, a *qui tam* plaintiff must allege specific facts . . . showing exactly how and when he or she obtained direct and independent knowledge of the *fraudulent acts alleged in the complaint* and support those allegations with competent proof.") (second emphasis added); *United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 388-89 (3d Cir. 1999) (Alito, J.) (finding that the relator was not the "original source" because he did not have "direct and independent knowledge" of the most critical element of the claims brought in his *qui tam* complaint); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 411 (9th Cir. 1993) (holding that an employee of a government subcontractor had "direct and independent knowledge" of the allegations contained in his *qui tam* complaint).

[4] *Amici* BP America Production Company *et al.* ("BP") therefore are mistaken when they argue that an "original source" must have "knowledge concerning 'allegations' that were publicly disclosed." *Amici* BP Br. 7. Such a requirement is inconsistent not only with the jurisdictional nature of the "original source" provision, but also with the plain meaning of the statute. An "original source" must have "knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). If BP is correct, then Congress intended for "the allegations" in that definition to refer to the allegations publicly disclosed. But, without knowing on what information the publicly disclosed allegations were based, a court has no way of knowing whether the relator's information was the basis for those allegations. A court can only know whether a potential relator has "direct and independent knowledge of the information on which the allegations" in the relator's complaint "are based." *Id.*

Amici BP seek to disqualify relator Harrold E. Wright from being able to bring a large and complex FCA *qui tam* action against major oil companies for underpaying royalties on natural gas, natural gas

The allegations in a relator's complaint form the basis for the cause of action under the FCA. An "action" is "based" on "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). The relevant allegations for purposes of § 3730(e)(4)(B), therefore, are those allegations "that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* For the relator to be an "original source," those essential allegations in his complaint must be "based on" information about which the relator has "direct and independent knowledge."

The information itself need not *prove* those allegations, but rather must support the truth or probability of allegations in the relator's complaint so "that, if proven," the relator will be entitled to relief "under his theory of the case," *Id.*; *see* Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 Liberty U. L. Rev. (forthcoming Dec. 2006), *available at* http://www.liberty.edu/LawReviewHesch ("Hesch manuscript").

The Tenth Circuit correctly concluded that "the phrase 'information on which the allegations are based' means 'the information *underlying or supporting* the fraud allegations contained in the plaintiff's *qui tam* complaint.'" Pet. App. 20a-21a (quoting *Hafter*, 190 F.3d at 1162). The court below also properly drew "a distinction between the actual act of fraud, *i.e.*, the actual submission of inaccu-

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liquids, and condensate. *See United States ex rel. Wright, et al. v. AGIP Petroleum Co., et al.*, No. 5:03-CV-264-DF (E.D. Tex.). The district court in that case has properly rejected the oil companies' efforts to defeat Wright as an "original source." *Last year*, this Court properly denied certiorari in a case arising out of the Tenth Circuit involving Wright's status as an original source. *See Comstock Resources, Inc. v. Kennard*, 125 S. Ct. 2957 (2005). Petitioners here – though not *amici* BP – concede that, even under their proposed test, Wright qualifies as an original source. *See* Reply to Briefs in Opp. at 1 n.1 (filed July 25, 2006) ("The relator in *Comstock* actually knew about the fraud itself – he held oil leases upon which Comstock was making inadequate payments.").

rate claims by Rockwell to [the Department of Energy], and the facts underlying or which give rise to the fraud, *i.e.*, the environmental, health and safety violations themselves." *Id.* at 21a. Stone readily satisfies that interpretation of § 3730(e)(4)(B). As the Tenth Circuit concluded, "Stone's knowledge that a defective pondcrete manufacturing process would be employed, gained from his review of Rockwell's plans, constitutes knowledge of information 'underlying or supporting' his allegation concerning Rockwell's alleged ultimate fraudulent activity." *Id.*

By contrast, petitioners' interpretation of "information" is inconsistent with the plain meaning of the statute. It is one thing to require an "original source" to have knowledge of information that gives rise to essential allegations of fraud. It is quite another to require an "original source" to have knowledge of the actual fraud itself, as petitioners urge. *See* Pet. Br. 31 (arguing that an "original source" must have "firsthand knowledge of the actual fraud"). This anti-textual reading of the statute is contrary to the plain meaning of the statute and is far more restrictive than Congress ever intended. *See infra* Part III.

b. Petitioners' interpretation also is inconsistent with the structure of § 3730, which indicates that Congress did not expect all "original source" relators to have the same amount of information when they file suit. *See generally* Hesch manuscript at 31-34 (explaining the significance of the FCA's "graduated knowledge" structure). Section § 3730(d)(1) provides "a descending scale of recovery ranges that are proportional to the public service provided by the relators." *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 105 (3d Cir. 2000) (Alito, J.). The highest range (15 to 25 percent) is for relators whose action is not "based primarily on" public disclosures and for most relators who qualify as "original sources." 31 U.S.C. § 3730(d)(1); *see Merena*, 205 F.3d at 105. A relator's recovery within this range depends "upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1).

An "original source" relator whose action is "based primarily on" public disclosures, by contrast, can receive at most 10 percent of the proceeds, and his recovery depends on "the significance of the information and [his] role . . . in advancing the case to litigation." *Id.* Thus, one relator might bring an action that is "based upon" but not "based *primarily* on" publicly disclosed information; another relator might bring an action "based primarily on" publicly disclosed information that he provided; and still another relator might bring an action that is "based primarily on" publicly disclosed information that he did not provide. Each of these relators could be an "original source." *See Merena*, 205 F.3d at 105.

Congress therefore provided that "original source" relators can have varying levels of information apart from that which is publicly disclosed – and receive substantially different relator's awards as a result. In so legislating, Congress did not create a single standard – such as "knowledge of the actual fraud" – that a relator must meet to qualify as an "original source." Rather, by referring to "information on which the allegations are based," 31 U.S.C. § 3730(e)(4)(B), Congress merely required an "original source" to have information that gives rise to allegations that, if proven, would entitle him to relief under his theory of the case.[5]

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[5] Of similar meaning is the requirement in the FSIA that the plaintiff's suit be "based upon," for example, a "commercial activity," 28 U.S.C. § 1605(a)(2), which this Court in *Nelson* interpreted as referring to "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case," 507 U.S. at 357. Courts have not interpreted that language as requiring plaintiffs to be able to prove every element of their claim. *See, e.g., Kirkham v. Societe Air France*, 429 F.3d 288, 292 (D.C. Cir. 2005) ("[S]o long as the alleged commercial activity establishes a fact without which the plaintiff will lose, the commercial activity exception applies, regardless of whether the plaintiff has either alleged or provided sufficient evidence of the additional facts necessary to prevail on the merits."); *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 682 (8th Cir. 2002) ("[O]nly one element of a plaintiff's claim must concern commercial activity carried on in the United States."); *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000)

2. "Direct and independent knowledge" means knowledge obtained from one's own efforts apart from the public disclosure

An "original source" will have two bases for the allegations – the information from the public disclosure and the information about which he has "direct and independent knowledge." 31 U.S.C. § 3730(e)(4)(B). The requirements that an "original source" relator's knowledge be "direct and independent" therefore distinguish between information "original" to the relator and information that is dependent on the public disclosure. *See Walters*, 519 U.S. at 209 ("Statutes must be interpreted, if possible, to give each word some operative effect."). Although the language used by the courts of appeals varies, most agree about the substance of the "direct" and "independent" requirements.

a. A relator has "direct" knowledge of the information on which he bases his allegations when he learns the information through his own efforts, not the efforts of others.[6] That usage is consistent with the plain meaning of "direct." *See Webster's Third New International Dictionary* 640 (2002) (defining "direct" as "transmitted back and forth without an intermediary").

A relator has "independent" knowledge of the relevant information when his knowledge is not obtained through the public disclosure.[7] That understanding likewise

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("The entire case need not be based on the commercial activity of the defendant.").

[6] *See, e.g., United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 941 (6th Cir. 1997) ("'marked by absence of intervening agency'") (quoting *Stinson*, 944 F.2d at 1160); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) ("first-hand knowledge"); *United States ex rel. Devlin v. California*, 84 F.3d 358, 361 (9th Cir. 1996) ("through their own labor unmediated by anything else"); *see also* Hesch manuscript at 19 ("Virtually all courts treat 'direct' as meaning 'firsthand' knowledge, which some interpret as something the relator sees with his own eyes.").

[7] *See, e.g., Minnesota Ass'n*, 276 F.3d at 1048-49 ("knowledge not derived from the public disclosure"); *Mistick PBT*, 186 F.3d at 389 (Alito,

comports with the plain meaning of the statute. *See id.* at 1148 (defining "independent" as "not requiring or relying on something else"). Taken together, a relator has "direct and independent knowledge" when the knowledge is obtained through his own efforts and not through the public disclosure.

b. Ultimately, petitioners do not disagree with that interpretation of "direct and independent knowledge." *See* Pet. Br. 30. But they do disagree that Stone had "direct and independent knowledge" in this case. Petitioners argue that Stone's "knowledge" was nothing more than "highly inferential predictions of future events." *Id.* at 31. That assertion, however, flows not from petitioners' interpretation of "direct and independent," but rather from their interpretation of "information." Petitioners believe Stone's knowledge improperly related to "future events" and that, because Stone was not employed at Rockwell when the "actual fraud" occurred, he cannot be an "original source."

But nothing in the meaning of "information" supports petitioners' erroneous view that an "original source" must have "firsthand knowledge of the actual fraud." *Id.* And, in this case, Stone was at Rockwell when events occurred at Rocky Flats that gave rise to the allegations of fraud in his *qui tam* complaint. *See* Pet. App. 17a-18a, 20a-21a. His allegations were based on first-hand observations he made at Rocky Flats, apart from any public disclosure of allegations. *Id.* at 21a.[8] He therefore had "direct

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J.) ("'learned of the information absent public disclosure'") (quoting *Stinson*, 944 F.2d at 1160); *McKenzie*, 123 F.3d at 941 ("not dependent on public disclosure") (internal quotation marks omitted); *Findley*, 105 F.3d at 690 ("cannot depend or rely on the public disclosures"); *see also* Hesch manuscript at 21 ("The best definition of 'independent' is knowledge not derived from or dependent upon the public disclosure itself.").

[8] In particular, the "gravamen of Stone's claim is that he learned from studying Rockwell's plans for manufacturing pondcrete that the blocks would leak toxic waste. The fact that he was not physically present at Rocky Flats when production began is immaterial to the relevant question, which is whether he had direct and independent

and independent knowledge" of the information on which he based the allegations in his complaint. 31 U.S.C. § 3730(e)(4)(B).

c. Petitioners also claim that § 3730(e)(4)(B) contains an additional, implicit requirement that governs "*how much* direct and independent knowledge the relator must possess." Pet. Br. 32. They claim their view is "the interpretation most faithful to the text," *id.*, but in fact their reading of § 3730(e)(4)(B) is not faithful to the statute's text at all.

A relator's knowledge of information is sufficient when he has direct and independent knowledge of enough information to support allegations of fraud that, if proven, would entitle him to relief. *See supra* p. 13. If the information known by the relator gives rise to allegations that would *not* entitle him to relief, or if the relator's allegations *would* entitle him to relief, if proven, but those allegations do not derive from the relator's "direct and independent knowledge," then the relator is not an "original source." The plain language of § 3730(e)(4)(B) supports that understanding, and there is no need for this Court to resort to the judicially created test proposed by petitioners.[9]

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knowledge of the information underlying his claim, in this case Rockwell's awareness that it would be using a defective process for manufacturing pondcrete." Pet. App. 21a.

[9] *Amici* BP similarly misread the statute. They argue that "[o]ne can not possibly have 'direct and independent knowledge' of the lawsuit's 'allegations' against the defendant unless he has *some* firsthand knowledge of the facts relating to the dealings between the defendant and the government that is the subject of the suit." *Amici* BP Br. 8. But the statute does not require knowledge of the allegations; it requires knowledge of the information underlying the allegations. The statute therefore does not require firsthand knowledge of the actual dealings between the defendant and the Government.

In the oil context, such a requirement would be completely absurd, because one division or office of an oil company typically reports and pays royalties to the Government based on information transmitted by completely different persons who monitor oil or gas well information. Under the oil companies' view, no person who had firsthand informa-

3. Information is "voluntarily provided" when it is given in the absence of compulsory process

a. The phrase "voluntarily provided" plainly means that the relator must give his information to the Government "without coercion." *Black's Law Dictionary* at 1605 ("voluntarily"). Coercion, in turn, can take many different forms. *See Webster's Third New International Dictionary* at 2564 (defining "voluntary" to mean "acting or done of one's own free will without valuable consideration; acting or done without any present legal obligation to do the thing done or any such obligation that can accrue from the existing state of affairs"). The FCA signals no preference, and the federal courts have not settled on a single meaning. *See, e.g., United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 340 (3d Cir. 2005) (Government "initiated contact with a subpoena demanding information fundamental to the putative relator's action"); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 743-44 (9th Cir. 1995) (en banc) (not voluntary because "compelled . . . by the very terms of his employment"); *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 704 (8th Cir. 1995) (not "voluntary" when "discussion was initiated by" government agent); *United States ex rel. Stone v. AmWest Sav. Ass'n*, 999 F. Supp. 852, 857 (N.D. Tex. 1997) ("uncompensated," "unsolicited," or not "uncompelled") (internal quotation marks omitted). It is therefore unclear from the statute what type of coercion Congress had in mind to negate a relator's voluntary action.

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tion of fraudulent activities in underreporting gas volumes or values could ever be an original source because that person did not have access to or knowledge of the highly confidential royalty reports by the companies to the Minerals Management Service of the Department of the Interior. *See United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 919 (4th Cir. 2003) ("[W]e decline to adopt Westinghouse's view that a single employee must know both the wrongful conduct and the certification requirement. If we established such a rule, corporations would establish segregated 'certifying' offices that did nothing more than execute government contract certifications, thereby immunizing themselves against FCA liability.").

The legislative history of the FCA, however, does speak directly to Congress's intent in the phrase "voluntarily provided." *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985) (consulting legislative history when "statute [is] ambiguous on its face"). The "voluntarily provided" requirement sought to exclude an individual who is "a source of the allegations only because the individual was subp[oe]naed to come forward." 132 Cong. Rec. 20,536 (1986) (statement of Sen. Grassley). It was not intended to exclude "those persons who have been contacted or questioned by the Government or the news media and cooperated by providing information which later led to a public disclosure." *Id.*; *see* Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the* Qui Tam *Door*, 27 Pub. Cont. L.J. 669, 715 (1998) ("Congress designed the provision merely to prevent those who were subpoenaed from qualifying as relators."). Many federal courts have found that legislative history persuasive in construing the meaning of "voluntarily."[10]

b. Contrary to countless decisions of this Court stating that statutory interpretation must begin with the plain meaning of the statute's text, *see, e.g.*, *Lamie*, 540 U.S. at 534, 536, petitioners' interpretation of the phrase "voluntarily provided" begins with the "statute['s] design[]" and a "Senate Report." Pet. Br. 45-46. Ultimately, they ask the Court to graft onto the statute a requirement that the relator's provision of information not only be voluntary but "help[ful]." *Id.* at 46. There is no basis in the statute's text or history for this new requirement, nor do petitioners cite a single judicial decision that has

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[10] *See, e.g.*, *Paranich*, 396 F.3d at 340-41 (quoting Sen. Grassley); *United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Group, Inc.*, 332 F. Supp. 2d 1, 10 (D.D.C. 2003) ("without need for a subpoena") (relying on Sen. Grassley's statement); *United States ex rel. Ackley v. IBM*, 76 F. Supp. 2d 654, 666 (D. Md. 1999) ("'[v]oluntarily' means not in response to a subpoena") (citing statement by Sen. Grassley); *see also Stinson*, 944 F.2d at 1168 n.1 (Scirica, J., dissenting) (citing statement by Sen. Grassley).

adopted it. The authorities that petitioners *do* cite relate to, in petitioners' words, "disclosure." *Id.* at 47. But § 3730(e)(4)(B) does not require "disclosure" – a word that conveys "making known something that was previously unknown," *Black's Law Dictionary* at 497 – it merely requires that the information be "provided."

In any event, petitioners offer several unpersuasive reasons why Stone did not "voluntarily provide" the Engineering Order to the Government. They assert that Stone's information does not "mention . . . a false statement or claim," "neither predicts nor identifies *any* false claim," and does not "communicate Stone's alleged conclusion that any piping problem will lead to insolid pondcrete." Pet. Br. 45. These complaints have *nothing* to do with the question whether Stone "voluntarily provided" the Engineering Order to the Government. Like petitioners' assertions about Stone's knowledge, *see supra* Part II.B.2.b, the true source of petitioners' discontent is that they do not like the "information" requirement in the statute. But they cannot credibly maintain that Stone did not provide the Engineering Order or any of the other information to the Government in anything but a voluntary manner.

C. The "Original Source" Provision Should Not Be Construed To Incorporate Concepts Already Present In The Federal Rules Of Civil Procedure

As the foregoing discussion demonstrates, the "original source" provision concerns where and how the relator obtained the information underlying the *qui tam* complaint allegations. Those principles are independent of requirements imposed by the Federal Rules of Civil Procedure, which complement the "original source" exception by independently requiring that a relator's complaint has sufficient legal and factual bases to proceed.

Rule 8(a)(2), for example, speaks to the legal sufficiency of a plaintiff's allegations. It requires a plaintiff to specify "a short and plain statement of the claim showing that

the pleader is entitled to relief." In other words, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any recognizable legal theory" or "allegations from which an inference fairly may be drawn by the district court that evidence on these material points will be available and introduced at trial." 5 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1216, at 220-27 (3d ed. 2004). The plain meaning of the "original source" exception is of a piece, as it requires the relator to make allegations that, if proven, would entitle the relator to relief on his theory of the case.

But merely alleging violations of the FCA is not enough under the "original source" exception or the Federal Rules. For FCA actions resting on claims of fraud, a relator must comply with Rule 9(b), which requires allegations of fraud to be "stated with particularity." A relator also must satisfy Rule 11(b)(3)'s requirement that "the allegations and other factual contentions have evidentiary support." Thus, Rules 9 and 11 together ensure the *legal* and *factual* adequacy of a relator's allegations of fraud. *See United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1018-22 (E.D. Va. 1995) (discussing the relationship between Rules 9 and 11 and § 3730(e)(4)). Those requirements complement the plain meaning of § 3730(e)(4)(B), which requires an "original source" to have "direct and independent knowledge" of *factual* information that supports allegations that, if proven, are *legally* sufficient to entitle the plaintiff to relief.

Rules 8, 9, and 11, moreover, apply to all FCA suits brought by all prospective relators, not just actions "based upon [a] public disclosure." 31 U.S.C. § 3730(e)(4)(A). Thus, these rules always ensure that a relator alleges the essential elements of his claim (Rule 8), pleads fraud with particularity (Rule 9), and has sufficient evidentiary support for his allegations (Rule 11). The "original source" exception does not heighten these requirements in any way. Rather, it seeks to determine whether the prospective relator has "direct and independent knowledge of the

information on which the allegations are based." *Id.* § 3730(e)(4)(B). The "original source" relator's knowledge must result from his own efforts – not the public disclosure or the efforts of others – and he must voluntarily provide his information to the Government prior to filing suit.

III. THE HISTORY OF THE 1986 AMENDMENT TO THE FALSE CLAIMS ACT CONFIRMS THE STATUTE'S PLAIN MEANING

The current version of the FCA resulted from the 1986 amendment to the 1943 provision, which had precluded any suit based on information in the Government's possession. Following the Seventh Circuit's restrictive interpretation of the 1943 statute in *Dean*, as well as a surge in government fraud in the 1980s, Congress again took up the subject of FCA reform.

"The legislative history in both houses of Congress reveals a sense that fraud against the Government was apparently so rampant and difficult to identify that the Government could use all the help it could get from private citizens with knowledge of fraud." *LaValley*, 707 F. Supp. at 1355; *see S. Prawer & Co.*, 24 F.3d at 326. To encourage relators to come forward, the bills included "increased monetary awards, adopted a lower burden of proof, and allowed *qui tam* plaintiffs to continue to participate in the actions after intervention by the government." *Springfield*, 14 F.3d at 651; *see S. Prawer & Co.*, 24 F.3d at 326. But Congress also wanted to be careful not to repeat the mistakes of the 1863 Act, which allowed parasitic suits based purely on publicly available information. To frustrate such suits, the 1986 amendment enacted the "public disclosure bar," which revived the "original source" requirement that had been dropped from the 1943 amendment. *See* 31 U.S.C. § 3730(e)(4)(A); *S. Prawer & Co.*, 24 F.3d at 326; *Springfield*, 14 F.3d at 651.

A. The Public Disclosure Bar Was Congress's Solution To The Restrictions On *Qui Tam* Suits Imposed By The 1943 Amendment

The first bill reported out of the House Judiciary Committee that led up to the 1986 amendment encouraged more *qui tam* suits by giving relators more rights than they had under the 1943 amendment. The House report makes clear that the committee sought to frustrate parasitic claims while encouraging "individuals who are aware of fraud . . . to bring such information forward." H.R. Rep. No. 99-660, at 23. Because the committee "recognize[d] the validity of the reasons for enactment of the 1943 amendments," it supported a "public disclosure" bar. *Id.* at 22. But the committee also recognized that "there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action." *Id.* at 22-23. The House bill therefore barred *qui tam* suits "based solely on public information" unless "the Government had had the information for six months before the *qui tam* action was filed" and not brought a case. *Id.* at 23; Robert L. Vogel, *The Public Disclosure Bar Against* Qui Tam *Suits*, 24 Pub. Cont. L.J. 477, 507 (1995) ("While granting more rights to relators, the House did not want to permit the unrestrained parasitism exemplified by the *Hess* case in which the relator simply found a criminal indictment and turned it into a *qui tam* suit."). To encourage non-parasitic claims, the House bill "increase[d] the awards payable to the relator" and provided "whistle-blower" protections "to those employees who put their jobs on the line by bringing such an action and/or participating in such." Vogel, 24 Pub. Cont. L.J. at 484; *see id.* at 507.[11]

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[11] This additional provision for whistleblowers, which remains in the FCA as enacted, *see* 31 U.S.C. § 3730(h), refutes BP's argument that only a "genuine 'whistleblower[]'" may be an "original source," *Amici* BP Br. 10; *see Walters*, 519 U.S. at 209 ("Statutes must be interpreted, if possible, to give each word some operative effect."). The Act's special whistleblower provision recognizes that an employee who alleges fraud

A parallel Senate bill under consideration at the same time reveals similar motivations. That bill was "aimed at correcting restrictive interpretations of," among other things, "*qui tam* jurisdiction and other provisions in order to make the False Claims Act a more effective weapon against Government fraud." S. Rep. No. 99-345, at 4, 1986 U.S.C.C.A.N. 5269. To prevent "windfalls" to "persons who may not have had direct involvement with investigating or exposing alleged false claims that are the basis of a *qui tam* suit," the bill provided that, if "the *qui tam* action is brought at least 6 months after a public disclosure, the Government has failed to act, and the suit succeeds, [then] the individual who brought the action would only receive 'up to 10 percent' depending on his role in advancing the case to litigation." *Id.* at 16, 1986 U.S.C.C.A.N. 5281; *see id.* at 30, 1986 U.S.C.C.A.N. 5295.

The bill the full Senate voted on, however, was not the same as the bill reported out of committee. *See LaValley*, 707 F. Supp. at 1355. "The new Senate version deleted the provision that would have permitted any relator to go forward with a *qui tam* suit if the Government had failed to act on publicly disclosed information for six months." Vogel, 24 Pub. Cont. L.J. at 508; *see LaValley*, 707 F. Supp. at 1356. In its place, the Senate substituted the "original source" exception. *See* 132 Cong. Rec. 20,531 (1986). "Thus, the Senate continued to bar the same type of 'parasitical suits' based on publicly disclosed information which were the concern of Congress in 1943." *LaValley*, 707 F. Supp. at 1356.

House and Senate negotiators ultimately reached a compromise at an "informal conference." Vogel, 24 Pub. Cont. L.J. at 508 (citing 132 Cong. Rec. 28,580 (1986) (statement of Sen. Grassley)). They agreed to adopt the House provisions that encouraged *qui tam* relators to come forward and a "modified version" of the Senate "original source" provision to discourage parasitic suits.

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against his or her employer needs protection from retaliation that a non-employee does not need.

Id.; *see LaValley*, 707 F. Supp. at 1356. Thus, the early versions of the 1986 amendment "would have permitted purely parasitic relators . . . with *no* personal knowledge of a fraud to proceed with lawsuits based on public disclosures in *one* circumstance: namely, when the Government had failed to act within six months of the disclosures." Vogel, 24 Pub. Cont. L.J. at 510-11. The final version of the bill barred "purely parasitic relators from going forward under *any* circumstances, requiring instead that all relators have *some* (but not all) information about the fraud that was not derived from certain public sources." *Id.*

B. The Parasitic Suits That Congress Intended To Foreclose Are Those In Which The Relator's Essential Allegations Of Fraud Are Supported Only By A Public Disclosure

The statutory and legislative history of the 1986 amendment confirms that Congress wanted any relator with information not from a public disclosure to aid the Government's fight against fraud by filing a *qui tam* suit. *See* Thompson, 27 Pub. Cont. L.J. at 704 ("The bar in the 1986 amendments is targeted only at those *qui tam* actions that are completely 'parasitic' – actions that depend entirely on publicly disseminated information from government sources or the news media.").

By incorporating the "original source" exception, rather than the six-month waiting provision originally drafted, Congress demonstrated its dissatisfaction with *Dean* and "the scope of the 1943 jurisdictional bar." Vogel, 24 Pub. Cont. L.J. at 509. Although the "government information bar" allowed parasitic suits after the passage of time, the "public disclosure bar" never allows a parasitic suit. And, unlike the "government information bar," the "public disclosure bar" authorizes suits "based on" a public disclosure, as long as the relator contributes original information to the suit that supports allegations that, if proven, would entitle the relator to relief. By permitting relators with personal knowledge of a fraud to "proceed with a *qui*

tam suit even where the information underlying the suit [i]s already known to the public (and, in many instances, the Government)," the final version of the law is a substantial departure from the 1943 amendment and the "government information bar." *Id.* at 510. The result is a regime that enables potential relators with non-public information about government fraud "to supplement the Government's law enforcement efforts with private resources, thereby enabling the Government to resolve fraud allegations more thoroughly and expeditiously." *Id.* at 508 (citing H.R. Rep. No. 99-660, at 22-23; S. Rep. No. 99-345, at 7-8, 1986 U.S.C.C.A.N. 5272-73); *see LaValley*, 707 F. Supp. at 1355.

The public-disclosure bar's focus on precluding only purely parasitic suits confirms that the focus of the "original source" exception is not on whether the relator can decisively prove fraud, but on whether the case "can properly be viewed as [parasitic]." *S. Prawer & Co.*, 24 F.3d at 327. The pertinent question in the "original source" inquiry therefore is not whether the relator has established every element of his cause of action, but whether he has given the Government information that advances the fight against fraud. *See id.* at 327-28; Vogel, 24 Pub. Cont. L.J. at 511. That construction is consistent with Congress's desire "to recharacterize as 'non-parasitic' actions which would have been considered 'parasitic' under the 1943-1986 regime" without returning to the 1863 regime upheld by this Court in *Hess*. *S. Prawer & Co.*, 24 F.3d at 328.

Petitioners' approach would bar many non-parasitic suits, contrary to Congress's intent only to bar parasitic suits and not to repeat the mistakes of the 1943 amendment. Particularly in a case like this one, in which the Government has no objection to the relator's status as an "original source,"[12] it would be contrary to congressional

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[12] *See* Plaintiff United States' Supplemental Response to Defendants' Memorandum Regarding Entry of Judgment at 4, *United States ex*

intent to preclude jurisdiction over a suit brought by a relator with information that gave rise to fraud allegations that ultimately enabled the Government to establish petitioners' liability. The "original source" provision, after all, was enacted to stop the Government from suffering the recovery-diminishing consequences of parasitism – it was not enacted as a sword to be used by FCA defendants to minimize the fee awards they are legally obligated to pay.

IV. A RESTRICTIVE READING OF THE "ORIGINAL SOURCE" EXCEPTION WILL LEAVE A RANGE OF FRAUDS UNDISCOVERED

Congress's "overall intent" in amending the *qui tam* provisions of the FCA in 1986 was "to encourage more private enforcement suits." S. Rep. No. 99-345, at 23-24, 1986 U.S.C.C.A.N. 5288-89. "In the face of sophisticated and widespread fraud, [Congress] believe[d] only a coordinated effort of both the Government and the citizenry [could] decrease this wave of defrauding public funds." *Id.* at 2, 1986 U.S.C.C.A.N. 5267. Now, 20 years and nearly $20 billion in recoveries later, petitioners seek to alter the balance that Congress struck by further restricting the pool of potential relators. If the Court were to adopt the anti-textual and counter-historical interpretation of the "original source" exception urged by petitioners, it would not only squelch the flow of information about fraud to the Government, but also permit fraudfeasors to drain the U.S. Treasury with impunity. *See* Hesch manuscript at 6 ("Without the help of relators, the government would lose more than one billion dollars per year because 70 percent of all government civil fraud recoveries are from *qui tam* cases.").

When Congress amended the FCA, it recognized the social, psychological, and financial burdens encountered by potential relators when they consider exposing another's fraud. Prior to amending the FCA in 1986, Congress

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rel. Stone v. Rockwell Int'l Corp., No. 89-M-1154 (D. Colo. filed May 6, 1999).

heard from Robert Wityczak, a triple-amputee veteran who exposed the fraudulent charging practices of Rockwell International. Mr. Wityczak told Congress: "I agonized over my decision to step forward. I have a wife, five children and a house mortgage .... Yet once I made the decision to tell the truth about what was going on, I found no one inside or outside the company willing to act on the information." S. Rep. No. 99-345, at 5, 1986 U.S.C.C.A.N. 5270 (ellipsis in original). Petitioners' interpretation of the "original source" exception would silence relators like Wityczak and Stone by creating from whole cloth a heightened evidentiary requirement to the "original source" exception and by requiring courts to examine the proof of fraud after a verdict to determine if the jury convicted based on the allegations in the relator's complaint.

In essence, petitioners advocate rewriting the "original source" exception to require a relator to have "direct and independent knowledge [of all of the information that was presented at trial or was agreed to in a False Claims Act settlement agreement]." But relators rarely, if ever, have complete knowledge of the entire fraudulent scheme.[13] Nor did Congress intend to require them to have such knowledge. Congress did not envision relators delivering ready-made cases to the Government, but instead "believe[d] that the amendments ... [would] allow and encourage *assistance* from the private citizenry" and thereby "make a significant impact on *bolstering* the Government's fraud enforcement effort." *Id.* at 8, 1986 U.S.C.C.A.N. 5273 (emphases added). Petitioners, however, would shift the entire investigative and litigative burden to the relators, thereby deterring all but the rare

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[13] *See Harrison*, 352 F.3d at 919 ("[W]e decline to adopt Westinghouse's view that a single employee must know both the wrongful conduct and the certification requirement. If we established such a rule, corporations would establish segregated 'certifying' offices that did nothing more than execute government contract certifications, thereby immunizing themselves against FCA liability.").

individual who had absolute knowledge of every minute detail of the fraud.

Moreover, even for that rare omniscient relator, petitioners would require him to clear a second hurdle of their own creation: all of the information originally supplied by the relator must have been necessary to achieve a successful verdict or settlement agreement. Thus, instead of a "coordinated effort" between the Government and the relator, the relator would lack the incentive even to assist the Government, fearful that the Government might use uncovered information to venture into new allegations of fraud that were not specifically detailed in the relator's original complaint. Indeed, as applied to this case, the Government could intervene in the relator's action and steer the case to a new path of fraud, thus using the relator's information to the Government's benefit but divesting the relator of any hope of a reward. Under this approach to *qui tam* litigation, no relator or relator's counsel would risk the personal or financial exposure of filing a *qui tam* suit.

This Court therefore should reject petitioners' attempt to shield the discovery of fraud by imposing on potential relators burdensome requirements that are contrary to the statute's plain meaning and Congress's stated intent. In amending the FCA, Congress believed that changes were "necessary to halt the so-called 'conspiracy of silence' that ha[d] allowed fraud against the Government to flourish." S. Rep. No. 99-345, at 6, 1986 U.S.C.C.A.N. 5271. Congress responded by enlisting the help of individuals with information about another's fraud. If petitioners have their way, however, these individuals will be unable and unwilling to join the fight against fraud. The "conspiracy of silence" will once again shroud the fraudfeasors' schemes to the great detriment of the public.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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November 20, 2006